

OFFICIAL OPINION NO. 77-13, Applicability of local zoning regulations to state property

January 25, 1977

Dr. Richard L. Bowen
Commissioner of Higher Education
State Office Building #3
Pierre, South Dakota 57501

Official Opinion No. 77-13

Applicability of local zoning regulations to state property

Dear Dr. Bowen:

You have requested an official opinion based on the following facts:

FACTS:

The Corporation for Public Broadcasting is developing a satellite system for transmission of Public Broadcasting Service programming. As a part of the system, The University of South Dakota as a public broadcasting licensee under the Board of Regents, has been designated as a site for location of a receive-only-earth-terminal. A part of the financial/legal consideration in establishing the system is local zoning ordinance control over the site.

Based on the above facts you ask:

QUESTION:

Whether or not State, or more specifically, Board of Regents property at the University in Vermillion is subject to local zoning ordinances.

The issue raised by your request is one of first impression in South Dakota. Consequently, my opinion must, of necessity, be predicated on the general rule as established by the decisional law of other jurisdictions in the United States.

It is the general rule that zoning regulations or land use restrictions do not apply against state owned property absent a clear manifestation of a contrary legislative intent. 8 E. McQuillin, MUNICIPAL CORPORATIONS § 25.15 (3rd ed. 1976). See *Floyd v. New York State Urban Development Corp.*, 70 Misc. 2d 187, 333 N.Y.S. 2d 123 (1972); *Berger v. State*, 72 N.J. 206, 364 A.2d 993 (1976); *Township of Lower Allen v. Commonwealth*, 10 Pa. Cmwlth. 272, 310 A.2d 90 (1973). Various jurisdictions have adopted specific factors which they feel are indicia of legislative intent either upholding or dissolving immunity in particular instances and which have given rise to three minority rules:

(1) The "governmental-proprietary" distinction has been borrowed from the tort immunity area. Prospective activities of the acting governmental unit are denominated as being governmental in nature or proprietary with only the former category maintaining immunity. This test of discernment has generally been applied only to subordinate governmental units. *City of Charleston v. Southeastern Const. Co.*, 134 W. Va. 666, 64 S.E.2d 676 (1950), *Washington Twp. v. Ridgewood Village*, 46 N.J. Super. 152, 134 A.2d 345 (1957), *aff'd*, 26 N.J. 578, 141 A.2d 308 (1958), *Kedroff v. Town of Springfield*, 256 A.2d 457 (1969).

(2) A strong minority of jurisdictions have placed dispositive weight on the grant of eminent domain authority by the Legislature to the particular entity-the feeling being that the grant of power to condemn is ipso facto an expression of legislative intent to grant immunity. *Seward County Bd. of Com'rs. v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), *State v. Allen*, 158 Ohio St. 168, 107 N.E.2d 345 (1952); *Aviation Services v. Board of Adjustment*, 20 N.J. 275, 119 A.2d 761 (1956).

(3) The recent trend in legislative discernment, now espoused in a distinct minority of states, is to weigh the relative merits of the competing governmental interests of the state and its representative agencies, as against the legitimate local interest, *Rutgers State University v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972); *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426 (1972).

While the former two rules have been criticized as too mechanistic with a tendency for producing inconsistent results, the latter view may have merit in an adjudicatory setting. It is my opinion, however, that the State of South Dakota has not manifested an intent to diminish the doctrine of immunity.

The general rule articulated *supra* emanates from notions of state sovereignty which places the actions of the sovereign beyond the call to question of a derivative governmental body and its laws. Immunity from local zoning regulations is a corollary of the doctrine of immunity from suit, a doctrine which is constitutionally mandated in article III, § 27, of the Constitution of South Dakota. That provision reads as follows:

The Legislature shall direct by law in what manner and in what courts suits may be brought against the state.

This provision has been construed as granting the Legislature absolute authority to determine not only how and whether the State may be sued, but even if the State may be sued. *Sigwald v. State*, 50 S.D. 37, 208 N.W. 162 (1926). This state has persistently asserted its immunity from suit as an inherent right of its sovereignty.

This insistence by the State on its immunity from suit is controlling in the instant situation since the right of a local governmental entity to assert its zoning ordinances or land use regulations against the State is innocuous absent a right to enforce its enactments in an adjudicatory hearing.

Addressing your more particular question concerning Board of Regents property: Since title thereto is held in the name of the State of South Dakota, any suit to enforce zoning regulations against said property would be prohibited by the State immunity doctrine.

Therefore, the answer to your question is NO.

Respectfully submitted,

William J. Janklow
Attorney General

WJJ:DF:jo